**In the**

# Supreme Court of the United States

October Term, 1949

**No. 364**

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Automobile Drivers and Demonstrators Local Union No. 882, RALPH REINERTSEN, Its Business Agent, and J. J. ROHAN, Its Secretary, *Petitioners*,

vs.

GEORGE E. CLINE, *Respondent.*

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ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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## BRIEF OF RESPONDENT

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## INDEX



## TABLE OF CASES

**STATUTES**

## CONSTITUTION

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October Term, 1949

| | | |
|---|---|---|
| Automobile Drivers and Demonstrators Local Union No. 882, RALPH REINERTSEN, Its Business Agent, and J. J. ROHAN, Its Secretary, | *Petitioners,* | No. 364 |
| vs. | | |
| GEORGE E. CLINE, | *Respondent.* | |

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

## BRIEF OF RESPONDENTS

### OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Washington (R. 17) is reported in Volume 133, Washington Decisions 644, 207 P.(2d) 216.

### STATEMENT OF CASE

Respondent is reluctant to burden the court with a statement of the case which must be in some respects repetitious of that set forth in the Petition for Writ of Certiorari. On the other hand, respondent is disturbed by the fact that petitioners' statement neither refers in detail to the intimidating manner in which the picketing was conducted nor, of even more importance, to the union demand which precluded settlement and

which respondent most certainly considers an unlawful union objective and ample justification for the Washington Supreme Court's conclusion that the picketing was coercive.

The respondent is engaged in the business of buying and selling used automobiles (R. 4). He has never employed a member of the petitioning union nor any salesman, doing all the selling himself (R. 6, 36).

The respondent's difficulties with the petitioning union commenced during the year 1945 when respondent was advised by the union through its Business Manager that unless he joined the union he would be accorded the same treatment as a neighbor down the street—picketed and put out of business. Thereafter, and as a result of this threat, respondent joined the union (R. 32).

After respondent joined the union it adopted a policy which required respondent to close on Saturdays. Respondent did not at first comply and his mechanic and handyman, not members of the petitioning union, were ordered off the premises on a Saturday visit to respondent's premises by the Petitioner Reinertsen (R. 33).

Subsequently, in the Spring of 1946, respondent joined a dealers' association in the hope that by doing so a deal could be made with the union to operate on Saturday. This association was composed, in part, of dealers such as respondent who belonged to both the union and the association (R. 75). Respondent paid one year's dues to the association from April, 1946 to April, 1947 (R. 34).

A contract was entered into while respondent was a member of both the association and the union which was in effect at the time picketing commenced on August 31, 1947, although respondent was not then a member of either group. At the time this action was commenced the petitioning union asserts that its demands were then based upon a new contract entered into on April 14, 1948 (R. 73-74).

Respondent, on the 30th day of August, 1947, advised the union through its secretary that respondent intended to open his place of business on Saturday and at the same time requested a withdrawal card from the union (R. 32). On the 31st day of August, 1947, Saturday, respondent did open his place of business and the petitioner, through its members, commenced the picketing complained of.

At that time respondent had two employees, a mechanic and a handyman (R. 36-37). Neither of these employees belonged to the petitioning union nor did it assert jurisdiction over them. These employees immediately quit work (R. 31), respondent's sales fell off (R. 84) and drivers for supply houses refused to deliver automobile parts and materials (R. 31-32). In order to obtain such supplies, respondent was required to transport them in his own vehicle and leave his place of business unattended (R. 41).

As a condition to withdrawing its pickets, the petitioner made two demands upon the respondent: (1) That respondent refrain from opening his place of business on Saturdays. After petitioner's new agreement with the dealers' association on April 14, 1948, this demand was modified to conform to that agreement which

required closing after 1 P.M. (2) That respondent employ a member of the petitioner union and that said employee be compensated by being paid seven per cent on all sales made at respondent's place of business, irrespective of whether or not such sale might be made by respondent.

The picketing of respondent's place of business, while it did not involve physical violence nor actual molestation of any person, carried with it certain elements of intimidation which were described in the uncontroverted testimony of respondent as follows:

> "A. They parade up and down the sidewalk part of the time, and part of the time they set on the front of my cars. The part of the time that they parade up and down the sidewalk, they manage to block driveways. I finally closed my main driveway so someone would not get run over there because they were forever stepping in front of an incoming or outgoing car. In addition to that, they've been taking down license numbers of people who stop there, and the method of procedure they use is fighting (frightening) a great many people away. They will get out there, one picket at each end of the automobile and holding up a big placard with a piece of paper on it and hold up a pencil and take down the number. When the owner of the car would ask what this is for they would reply, 'Well, you'll see,' and some customers have said, 'Well, do you think you can cause me trouble,' to which the pickets reply. 'You'll see,' and at this stage of the game most of the customers flee the scene.
>
> Q. What affect has this had upon your business?
>
> A. Well, the effect on the sale of automobiles has been that it has dropped off to practically

nothing, and previous to the picket line I hired a mechanic to keep the automobiles in operating condition. Since the picket line the mechanic fears to work on the premises, so I have no method of keeping my automobiles in operating condition * * *.

Q. What has been your experience in so far as securing the delivery of merchandise to the premises? Have you had any difficulty in that respect?

A. No truck driver will deliver merchandise to the premises * * *.

Q. After these truck drivers have made a delivery and you have received it in front of your premises, have they made any deliveries after that?

A. No, they ceased making deliveries after that." (R. 30-31)

With respect to the union's demand that respondent employ one of its members, Mr. Reinertsen, the Business Agent and one of the petitioners, testified as follows (R. 76, 77):

"Q. Well, now, Mr. Reinertsen, it is your position then that Mr. Cline, in order to stop this picketing, must close Saturdays at one o'clock? That is correct, that is one contention, isn't it?

A. Yes, sir.

Q. That he must hire a Union salesman, that is another one, isn't it?

A. That is right.

Q. And that if he sells cars himself under the contract he (Fol. 67) must pay the commission to that salesman of seven per cent, is that right?

A. Yes, sir.

Q. Now, you have other dealers, do you not, who

belong to the Union and employ no salesmen? I believe you testified to that effect.

A. Yes, we do.

Q. And they don't have to pay this commission to anyone, do they? They retain it themselves?

A. That's right.

Q. So that by virtue of not being a member of the Union he would be deprived of the privilege of operating his business and keeping the seven per cent for himself?

A. Uh-huh."

Mr. Reinertsen further testified with respect to the payment of the seven per cent as follows (R. 78): 78):

By MR. BASSETT:

Q. The dealers who do not employ salesmen are members of the union, are they not?

A. Yes, sir.

Q. And they conform to the contract that the Union has with all other dealers who do employ members of the Union?

A. Yes.

MR. MCCUNE: With the exception that they retain the seven per cent themselves.

MR. BASSETT: If they don't employ anybody, certainly they retain it.

MR. MCCUNE: It is your position, then, that this man should no longer retain the seven per cent for himself but should pay it to someone else, is that right?

A. That is right.

By MR. BASSETT:

Q. Mr. Reinertsen, if Mr. Cline should employ

a salesman, that would not prevent him from selling, would it? He could still sell?

A. He could still sell, but the commission would have to be paid on everything he sold as well as what the man sold himself.

Q. I see. That is the contract that you have with all the other dealers?

A. That is the contract, yes."

As evidenced by the above testimony, it was therefore the position of the petitioning union that it was justified in singling out Mr. Cline and imposing the seven per cent penalty upon him which it did not impose upon dealers with whom it had contracts and who operated their places of business without the help of union salesmen, for the reason that Mr. Cline was not himself a member of the union.

At the same time respondent notified the union of his intention to open on Saturdays, he advised the union he was withdrawing from its membership and requested a withdrawal card (R. 32). The Washington Supreme Court found that he had not been a member of the union since the time the union had started to picket his place of business in 1947 (R. 24).

Respondent discussed with union representatives the possibility of his again becoming a member of the union and ironing out their differences. He was advised that he could never become reinstated in the union again (R. 48-49). Mr. Reinertsen's version of his conversation with respondent relative to possible settlement of their differences varies but little from that of respondent. Mr. Reinertsen testified that upon a request from respondent he visited respondent's

place of business and went over with him the contract which was entered into with the dealer's association on April 14, 1948. Of their conversation, he testified, in part, as follows (R. 73-74):

> "A. He read it over. I think he read every word of it, at least he took plenty of time for it, and he said, 'All right, what will I have to do now?' I said, 'We ask that you sign the contract and live up to the provisions of the contract.' 'Well,' he said, 'what does that mean?' I said, 'It means closing at one o'clock on Saturdays now and of course putting on a salesman.' 'Well,' he said, 'I'm not going to put on a salesman'. 'Well,' I said, 'you wouldn't be complying with the contract unless you did.' So he said 'Well, let me take this and show it to my attorney,' and I said, 'No, I don't think that (Fol. 63) is necessary, Cline. You can probably find one somewhere else, but I'm not going to leave you the contract unless you sign one,' and that was about all that was said.
>
> Q. Did he say anything about wanting to be reinstated as a member of the Union?
>
> A. He said, 'I can't hire a salesman.' I think he said 'What about myself,' and I said, 'No, that wouldn't do, you know that,' and I don't believe it went any further so far as that goes."

Relative to respondent's affiliating himself with the union as was customarily done by other dealers who did not employ salesmen, Mr. Reinersten testified as follows (R. 74):

> Q. Under the union rules and principles of organized labor is a man who works behind a picket line ever eligible for membership?
>
> A. Never."

The effect of the picket line upon respondent's business was, of course, immediately felt. He testified that his volume of business declined $8,000.00 to $10,000.00 per month (R. 84). His mechanic and repair man immediately stopped work (R. 31) and he was unable to secure deliveries of merchandise and supplies (R. 31). Mr. Reinertsen testified that union members crossing the picket line were immediately cited before their executive boards and reprimanded (R. 64). Defendant's Exhibit 2 sets forth the union constitution and by-laws and indicates that the penalty might include fine or expulsion from the union (See Article VII, Sections 4-11 of this Exhibit). Mr. Reinertsen further testified that this would apply to all members of the Teamster's Union comprising from 17,000 to 18,000 members in the City of Seattle (R. 63).

Petitioner's statement of the case would indicate (pages 16-17 of Petition) that the Supreme Court of Washington reached its decision solely upon a conclusion that no labor dispute was involved and that the picketing was therefore coercive. Petitioners state in their argument:

> "The picketing enjoined by the decree was admittedly peaceful and free from physical coercion or intimidation and when initiated was conducted for the purpose of compelling the respondent to observe a contract which bound him and other used car dealers in the Seattle area to close on Saturdays. Later, when that contract expired and respondent was not a party to the new contract which required closing on Saturdays after 1:00 P.M., the purpose of the picketing was to induce

respondent to conduct his business in conformity therewith," (Quoted from Petition, page 17)

Such an assertion is very far from accurate and overlooks both the record and the comments made with respect thereto in the Court's decision.

The Washington Supreme Court held the picketing to be coercive and unlawful after it had either set forth in its opinion or alluded to the following:

A. The scope of the petitioning union's picketing activities. The Court set forth portions of the respondent's testimony (R. 22).

B. The nature of the union demands as a condition to removal of its pickets and the fact that the petitioning union demanded that respondent employ a member of the union, such employee to be compensated by being paid seven per cent of all sales made at respondent's place of business, irrespective of whether such sale was made by the employee or by respondent (R. 23).

C. The circumstances under which respondent joined the petitioning union in 1945. In this connection, the Court quoted from the record (R. 20).

## COUNTER STATEMENT OF QUESTIONS INVOLVED

In the light of the Record, respondent believes the questions involved before this Court resolve themselves as follows:

1. Is the Supreme Court of a state required to tolerate as an exercise of the right of free speech picketing of an owner operated business employing no person subject to membership in the picketing union where one or more of the following conditions exist:

(a) The picketing as conducted is peaceful in that the pickets neither used force, threatened physical violence nor actually molested any person, but did carry out the picketing in such a manner as to impart to it certain elements of intimidation?

(b) The picketing union demands that the owner of the business employ a union member to carry out duties which the owner has heretofore performed himself and which essentially comprise the entire business; further stipulating that if the owner performs any of such work himself he pay a penalty to the union member even though it may not be earned, a condition which is not exacted from other self employed operators?

Respondent does not believe that in view of either the manner in which the picketing was carried out or its purpose this case presents to the Court the basic issue of whether or not the doctrine of free speech as applied to picketing has been carried to a point where it infringes upon the right of self employed individuals to engage in free enterprise in these United States.

## SUMMARY OF THE ARGUMENT

Picketing is more than the mere exercise of free speech and this Court has recognized the paramount right of the states in the exercise of their police power and in the interest of society as a whole to place reasonable restraints upon its use (pages 13 to 27).

The facts of the instant case highlight the dual aspects of picketing (pages 17 to 21). The picketing here enjoined was both carried on in a manner calculated to intimidate and has an improper and unlawful objective.

The Washington state legislature has by its little Norris-LaGuardia legislation indicated that picketing, even in a labor dispute, may be unlawful and has left the test of unlawfulness to the court in which an injunction is sought. Here the court found no labor dispute and the legislation does not apply. Nevertheless, it is indicative of the legislative intent to establish a minimum area within which the court in the absence of certain findings, including unlawfulness, could not enjoin. By inference and traditionally, the courts also have the right to determine what constitutes unlawful conduct in picketing not involving a labor dispute (pages 27 to 31).

The *Wohl* and *Angelos* decisions can be distinguished from the instant case, and the *Giboni*, *Wagshall* and other cases cited, lend support to respondent's conclusions (pages 31 to 37).

The unlawful purpose test as applied to the instant case sets it apart from other decisions of this court and clearly indicates the propriety of the injunction.

## ARGUMENT

### The Dual Aspects of Picketing

The Washington Supreme Court decision rests squarely on the conclusion that the union in the manner of picketing and union objective was exercising something more than free speech. In so holding, the Supreme Court of Washington is in accord not only with the decisions of this Court, but also with the majority of other jurisdictions in this country.

At this date, there can be little doubt that picketing in its speech aspects is accorded the protection of the First and Fourteenth Amendments. This doctrine (for such it has become) linking picketing with the Constitutional mandate of free speech is clearly and logically applicable where picketing is essentially communication of ideas. But, true to the pattern of the whole of our law that to be workable it must always remain a compromise between complete freedom of action and expression, on the one hand, and the common convenience of all, on the other, there are certain limitations to this abstract doctrine. And these limitations apply not only where picketing is concerned, but to speech in a purer state as well. Stated broadly, these limitations appear to be nothing more than that speech, and particularly picketing, must be pursued by lawful means, and for lawful purposes, traditionally in accord with the equitable theory of balancing the respective competing interests of the participants with respect to society as a whole.

The Supreme Court of the United States in identifying picketing with free speech has never in any

instance purported to create a new concept of free speech, nor has it ever indicated as its view that "picketing free speech" is endowed with any rights or immunities not accorded to other forms of communication.

On the contrary, this Court has, from the inception of this assimilation of picketing as free speech, always recognized the dual aspect of picketing and boycotting as both a form of speech and conduct. It is the latter element which allows it to be regulated to an extent not permissible in the case of more orthodox forms of free speech. As the Court stated in its unanimous decision in the case of *Giboni v. Empire Cold Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 649:

> "Neither *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, nor *Carlson v. California*, 310 U.S. 160, 60 S. Ct. 746, 84 L. Ed. 1104, both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of the conduct is carried on by display of placards by peaceful picketers."

In both these cases, the Court struck down statutes which banned *all* dissemination of information by people adjacent to certain premises, pointing out that the statutes were so broad that they could not only be utilized to punish conduct plainly illegal, but could also be applied to ban all truthful publications of the facts of a labor controversy.

But in the *Thornhill* opinion, 310 U.S. 88, 103, 104, 60 S. Ct. 736, 745, 84 L. Ed. 1093, the Court was careful to point out that it was within the province of states,

"to set the limits of permissible contest open to industrial combatants."

*supra* at U.S. 489, 499. Again in the *Giboni* case, *supra*, the Court said,

> "Appellants also rely on *Carpenters' Union v. Ritter's Cafe*, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143, and *Bakery Drivers v. Wohl*, 315 U.S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 decided the same day. Neither lends support to the contention that peaceful picketing is beyond state control."

The Court's opinion in the *Ritter* case, *supra*, approvingly quoted a part of the *Thornhill* opinion, *supra*, which recognized broad state powers over industrial conflicts.

There have been other references by the members of this Court to picketing as a dual institution. In a concurring opinion in the *Wohl* case, *supra*, at 310 U.S. 776, Mr. Justice Douglas joined by Messrs. Justices Black and Murphy said,

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."

Respondent does not read into or understand these statements as meaning that there is anything inherently improper in picketing as a union activity. Nor is it the purpose here to impress such a view upon this Court. The respondent merely offers the suggestion that the non-speech aspects of picketing as recognized by this Court in all of its decisions dealing with the problem do not stand rooted in the First Amendment

of the Federal Constitution. This being the case, the states' rights to regulate this aspect of picketing are similar to their power of regulation over other concerted activities that do not have the special Constitutional immunity granted by the First Amendment —and recognizing always that even rights protected under that Amendment have their own limitations. Such a suggestion is by no means novel, as our perusal of the opinions both of this Court and others would indicate. It is only the speech aspects of picketing that the Court assimilated with the First Amendment liberties when it handed down the *Thornhill* decision. This seems to be implicit in the decision, the Court saying:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." 310 U.S. at 103

That the "conduct of their affairs" referred to in this statement of the Court means activities other than speech activities, seems clearly indicated by what immediately follows, which reads,

> "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern."

Ibid. This latter statement would appear to be patently inconsistent with the former but for the Court's appreciation of the dual nature of picketing.

The most recent recognition by this Court of the conduct implications of free speech is to be found in the *Empire* case, *supra*. That case held that states have "paramount" power to regulate and govern the manner in which certain trade practices shall be carried on, and that nothing in the Constitutional guarantees of free speech compels a state to apply or not to apply its anti-trust restraint law to groups of workers, businessmen or others. And although the decision rests upon a state anti-trust statute, the principle announced is clearly applicable to all labor activity, the Court saying,

> "It is true that the agreements and course of conduct here were as in most instances brought about through writing and speaking. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed. See *e.g. Fox. v. Washington*, 236 U.S. 273, 277, 35 S. Ct. 383, 384, 59 L. Ed. 573; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U.S. 490, 502, 69 S. Ct. 684, 691, 93 L. Ed. 649, 656.

**The Dual Aspect of Picketing as Applied to the Instant Case.**

Pure free speech played little part in the effort of the union to, as indicated in its Petition, "persuade

respondent, by use of economic pressure" (page 22). Counsel for respondent has a strong and possibly outmoded belief that an exercise of free speech, while it might not be conducted with all the finesse of a Dale Carnegie graduate, somehow contemplates the imparting of information calculated to persuade, after which the recipient as a free agent must decide for himself whether or not he will, if picketing is concerned, cross the line. If only free speech were involved, his conscience and no other factor would influence this decision.

Beyond the usual assertion that respondent was "Unfair" as set forth on petitioning union's placards, no attempt was made in any way to convey to the public the reason for the picketing or the merits of the union position. On the contrary, the picketing union relied entirely on the aspects of picketing unrelated to free speech. The picket line became a sacred wall to be worshipped from one side only and from 17,000 to 18,000 (R. 63) residents of Seattle could not cross it without being immediately cited before their Unions (R. 64). The Union's Business Manager testified that anyone who worked behind it was thereby forever banned from union membership (R. 74). Deliveries to respondent's premises were abruptly halted (R. 31). Persons who asked why their automobile license numbers were being taken down were informed, "You'll see," and as stated by respondent, "at this stage of the game most of the customers flee the scene" (R. 30-31).

Mr. Reinertsen testified that the license numbers, except for those of union members were filed in the

wastebasket (R. 63). Respondent submits that the fact that the pistol held to the victim's head is unloaded makes the crime no less an assault with a deadly weapon.

Aside from the manner in which the picketing was conducted, and of even more importance in respondent's opinion, was the end sought by the petitioning union.

Respondent in this connection wishes to call attention to the fact that the Petition for Writ of Certiorari indicates that the union's only desire was that respondent refrain from operating his business on Saturdays, which demand was modified after April 14, 1948 to conform to a new contract requiring closing at 1:00 P.M. on Saturdays (page 15). Nothing could be further from the truth than such an impression.

Respondent believes that whether or not a union has an inviolable right to picket a self employed individual to compel him to conform in his personal hours of work to the terms of a contract between the union and an association of employers and self employed individuals, some of whom belong to both groups, and to which contract the picketed individual is not a party, presents an issue as vital to individual enterprise and liberties as any that put tea in Boston harbor.

On the other hand, respondent does not consider that this case must turn upon so basic an issue. A settlement of the differences between respondent and the petitioning Union was precluded by the Union's demand that respondent hire a salesman to, in effect, take over respondent's duties.

Petitioner Reinertsen's testimony on this point and relating to a conversation with respondent taking place shortly after the union had signed the April 14, 1948 contract was, in part, as follows (R. 73):

> "I said, 'We ask that you sign the contract and live up to the provisions of the contract.' 'Well,' he said, "what does that mean?' I said 'It means closing at one o'clock on Saturdays now and of course putting on a salesman.' 'Well,' he said, 'I'm not going to put on a salesman.' 'Well,' I said, 'you wouldn't be complying with the contract unless you did.' "

The salesman to be so "put on" would have received as compensation seven per cent of all sales made. The fact that the sale might be made by respondent would make no difference (R. 77). If respondent sold a car for $1,000.00, his percentage of net profit would have run from "eight and one-third down to months when I lose money" (R. 79). Under the union demand, seven per cent or $70.00 of that amount would be paid to a feather bedded salesman.

The petitioning union concedes that the other self employed dealers are permitted to join the union and keep the seven per cent themselves (R. 77-78). Respondent, they argue, having worked behind a picket line, is forever barred from union membership (R. 74) and this being the case, they are justified in singling him out from among his other fellow dealers to impose this penalty.

In effect, the union is exercising all the prerogatives of a police judge giving a vagrant two hours in which to leave town. The respondent's occupation is that of

an automobile salesman. He had been in business over four years (R. 30), employing no member of the petitioning union and doing all the selling himself. The union objective is to require him in a competitive market to charge $70.00 more on each $1,000.00 of sales to realize the same profit as his self employed competitor. The result is obvious. If the union's position is sustained, either a change of climate or of occupation will be unavoidable for respondent.

One of the smallest cogs in our economic system has become engaged with one of its biggest gears. Unless some relief is afforded, it will not be a pleasant sight to stand back and watch the teeth fall out.

**Recognition of the States Power to Impose Reasonable Limits Upon the Right to Picket**

Through its basic understanding of the nature and character of picketing, this Court has in no instance been forced to depart from its oft repeated Constitutional doctrine that in construing state statutes, the interpretation of the state court of last resort is binding upon the Federal courts. Nor has it become necessary for the Court to render the application of this principle nugatory in cases involving the interpretation by the state courts of "labor disputes" within the meaning of local statutes, *Lauf v. Shinner*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 872.

Under this view of state policy, the decisions including and following the case of *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1129, are completely harmonious with the

latest exposition by the Court in the *Giboni* case, *supra*, of its approach to the picketing problem. The *Senn* case was the first decision which linked picketing with free speech. The State court denied an injunction to a self-employed craftsman who had sought to restrain picketing of his place of business. This Court affirmed, upholding the state anti-injunction policy.

In the next two cases involving the right to picket before this Court, *Thornhill v. Alabama*, *supra*, and *Carlson v. California*, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104, it was held that a broadly drawn statute or city ordinance prohibiting all picketing is ON ITS FACE a violation of the due process clause of the Fourteenth Amendment. In so doing, the Court made no refutation of the states' power in this field, but, rather, molded it to fit the established pattern for review of any state policies pertaining to rights claimed under the Federal Constitution by virtue of the Fourteenth Amendment. The particular legislative attempts at regulation were found to be so all inclusive as to be incapable of definite application—therefore lacking in that element of certainty so essential to the preservation of basic rights and liberties.

The natural symmetry of the Court's reconciliation of the Tenth and First Amendments to the Federal Constitution became even more apparent after the decision in *Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200. In that case, the Court found a "background of violence" which it re-

fused to separate from the other aspects of the picketing, affirming the state court.

The companion case to the *Meadowmoor* case, *supra*, that of *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, it is submitted, represents probably the most emphatic illustration in this line of decisions of the whole underlying Constitutional postulate of "dual sovereignty." The case is significant because it indicates this Court's unwillingness to overrule a state court's finding on the merits that the particular acts constituted unlawful conduct. Rather, this Court preferred to consider the all-embracive language of the state court's dicta as exemplifying the state policy. As stated by Mr. Justice Frankfurter, the issue was there determined to be as follows:

> "More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the Common Law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

The Court answered affirmatively. On the basis of the above statement of the issue, it clearly appears that this Court was stressing the holding in its entirety including the dicta in the court below and thereby rendering the decision of the court below all inclusive as to stranger picketing and likening it to the situation presented by all inclusive legislative enactment in the *Thornhill* case. The *Swing* case therefore stands for the principle that it is a deprivation of the right of

free speech for a court to flatly conclude that all stranger picketing is unlawful.

As already heretofore pointed out, the Washington Court in the instant case considered both the manner in which the picketing was conducted and the purpose of the picketing before finding the picketing to be coercive and unlawful in light only of the factual situation as presented by the particular case.

The next anti-picketing injunction case coming before this Court was *Bakery & Pastry Drivers & Helpers Local 802, etc. v. Wohl*, 315 U.S. 769, 62 S. Ct. 807, 86 L. Ed. 1178, involving a controversy between a union of bakery wagon drivers and a group of non-union peddlers of bakery products. In reversing the judgment of the Court of Appeals of New York, this Court said:

> "The record in this case does not contain the slighest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A State is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But, so far as we can tell, respondent's mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the

means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue." *Ibid* at 315 U.S. 775.

The *Wohl* case stands primarily as an illustration of the rule that a finding that there is no "labor dispute" under the states' anti-injunction law, does not in itself warrant a restraint on picketing. Under this decision, we note that no fault was found with the state law as ennunciated in its Civil Practice Act. Rather, the admonition is directed to the State Court for failing to determine all the elements necssary under that act to reach a conclusion that no labor dispute is involved—clearly a departure by the state court itself from the public policy of its own jurisdiction. Moreover, the opinion of this Court goes on to say by way of dictum that if the state court had followed the mandates of its legislature as to the requisite findings and had found the union's objective to be unlawful, the injunction might have been issued.

It would be folly to assert that *Cafeteria Employees Union v. Angelos*, 320 U.S. 321, 64 S. Ct. 126, 88 L. Ed. 58, did not initially leave counsel for respondent pale and shaken. On its face, the decision is irreconcilable with both the prior and subsequent holdings of this Court if the strong language expounding the Constitutional guarantee is considered apart from its context. In the light of further examination both of the decision and the proceeding in the state court, we submit that the decision is not adverse to the theory of the instant case nor is it in conflict with those cases following the *Senn* decision.

In the *Angelos* case, the Court examined the record, looked behind the findings of "no labor dispute" and "coercion" and rejected the findings of the lower court. The holding was that the states cannot too narrowly define the limits of industrial dispute by acting arbitrarily. In the *Angelos* decision, this Court found the New York Court to have been acting arbitrarily. The New York Court had based its decision primarily upon the manner in which the picketing was conducted. This Court considered the acts complained of as being too "isolated and episodic" to constitute coercion. No other unlawful acts or purposes being alleged, the Court reversed, there being no reasonable basis upon which the Court could base an affirmance.

A further and more complete discussion of the *Angelos* case is to be found on page 33 of this brief.

The next full statement by this Court wherein the states' "paramount power" in this field is reaffirmed is found in *Giboni v. Empire*, *supra*, where, in answer to the union's contention that the injunction issued by the state trial court was an unconstitutional abridgement of free speech, the court said at 336 U.S. 502, 69 S. Ct. 691, 93 L. Ed. 656:

> "Missouri, acting within this power, has decided that such restraints of trade as petitioners sought are against the interests of the whole public. * * * It is not for us to overrule this clearly adopted state policy."

Up to this point, respondent has confined his argument to pointing out the propriety of state regulation in the field of picketing and the finality of a state

tribunal's exposition of local statute, subject always, of course, to review on the basis of reasonableness. Concededly, since states have "paramount power" in the regulation of the economic and trade practices within their borders as limited by the commerce clause as well as the due process and equal privileges and immunities clause of the Fourteenth Amendment, it becomes pertinent where rights are claimed under the First Amendment as incorporated into the Fourteenth Amendment to determine whether the state court in this case was enjoining the picketing as speech or as unlawful and tortious conduct which was so intermeshed with the communication elements as to make the true speech elements inextricable for purposes of severing them from those other elements subject to regulation.

**Effect of State Legislation as Expression of Policy**

This state, acting through its legislature, has indicated its ideas of what the minimum area of "free speech" in labor disputes should be (Remington's Revised Statutes of Washington, 7612, Secs. 1-15), and has molded these mandates along the identical lines pursued by Congress in the Norris-LaGuardia Act. In so doing, it purported only to delineate the lines across which the courts through the exercise of their equitable powers could not cross. However, it did not purport to legislate with respect to free speech in situations not falling within the purview of the statute, but preferred to leave the protection of the individual in such situations to the courts. The reasonableness of this legislation is not here in issue, nor is its con-

titutionality. It is important only in this respect—it is a statutory guide to the public policy of this jurisdiction.

Section seven of this act reads in part as follows:

> "No court of the State of Washington or any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case INVOLVING OR GROWING OUT OF A LABOR DISPUTE, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and EXCEPT after findings of fact by the court, to the effect
>
> "(a) That UNLAWFUL acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained. * * *"

Section 13(c) of the act defines a "labor dispute" as including:

> "Any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The Washington trial court found, and the State Supreme Court affirmed, that no labor dispute existed within the meaning of the statute. The statute therefore has no direct application to the instant case. Its importance lies in the fact that while it specifically

enumerates certain activities which cannot be enjoyed it no where attempts to define, even in a labor dispute, what constitutes "unlawful acts" within the meaning of Section 7612, Subsection 7 (*supra*). Whether a given act is unlawful must be determined by the court under the facts of each case.

Viewed from any angle, it clearly appears from the above quoted provisions that both the Washington legislature and Congress have recognized that picketing, although "peaceful" may yet be "coercive" and enjoinable. That picketing, although 'peaceful' may be 'unlawful' and 'coercive' and therefore not stand within the protection of the mantle of the First and Fourteenth Amendments of the Federal Constitution has been recognized by this Court in applying the Federal Norris-LaGuardia Act. *Bakery Sales Drivers Local Union No. 33, et al. versus Wagshal*, 333 U.S. 437, 68 S. Ct. 630, 92 L. Ed. 792.

It should further be noted that Section 7612, Subsection 2 of the Washington "Little Norris-LaGuardia Act" reads in part as follows:

> "In the interpretation of this act and in determining the jurisdiction and authority of the courts of the State of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the State of Washington is hereby declared as follows:
>
> " 'Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of con-

tract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, *though he should be free to decline to associate with his fellows*, it is necessary that he have full freedom of association, self organization, and designation of representatives of his own choosing * * *."

This legislation was passed in 1933. As a statement of policy it could well be said to be an expression of the liberty which any individual might expect to have at common law or under the First and Fourteenth Amendments. Perhaps in no small measure this accounts for the fact that the Court set forth in its opinion (R. 20) respondent's account of the circumstances under which he was coerced into joining the petitioning union. Possibly the Court felt that the petitioning union, having tossed the lighted squib and set up an unfortunate chain of circumstances, should assume some responsibility for the ultimate explosion.

A further Washington statute deserves mention as illustrative of the policy of this state. It reads:

"Whenever two or more persons shall conspire—

"(5) To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use of employment thereof; or

"(6) To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law; or

> "(7) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means. Every such person shall be guilty of a gross misdemeanor." Remington's Revised Statutes of Washington, 2382, Sections 5, 6 and 7.

Supplementary is Remington's Revised Statutes, 2383:

> "In any proceeding for (a) violation of Section 2382, it shall (not) be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination."

This legislation has been held to apply to labor unions: *Sears v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 524*, 8 Wn.(2d) 447, 112 P.(2d) 850 (1941).

**_Wohl_ and _Angelos_ Decisions Distinguished from Instant Case**

In *Bakery & Pastry Drivers & Helpers v. Wohl, supra*, the New York Court had enjoined picketing on the basis that no labor dispute existed as defined by the State Civil Practice Act, but this Court invalidated the injunction, declaring:

> "one need not be in a labor dispute as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." 315 U.S. 769, 744, 62 S. Ct. 816, 818, 86 L. ed. 1178, 1183.

A further qualification was expressed in the opinion:

> "* * * there are no findings and no circum-

> stances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive, and that it was not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by the individual." 315 U.S. 769, 775, 62 S. Ct. 816, 818, 86 L. Ed. 1178, 1184.

The Court further intimated that the picketing could have been enjoined if it were for an illegal end by stating:

> "The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that 'we have held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately 30 dollars a week, to hire an employee at 9 dollars a day for one day a week.' *Opera-on-Tour v. Weber*, 285 N.Y. 348, 347 cert. denied, 314 U.S. 615. But this lacks the deliberateness and formality of a certification and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered." 315 U.S. 769, 744, 62 S. Ct. 816, 810

The *Wohl* case, therefore, stands for the proposition that a state cannot so define a "labor dispute" as to exclude a dispute between a union and a retailer selling products handled by peddlers in the same industry as a union, merely because none of the union

members were employed by the retailers and having done so in the absence of any coercion or conduct otherwise unlawful or oppressive, the Supreme Court will will refuse to draw any inference that the picketing was contrary to the law of the jurisdiction.

This dicta from the *Wohl* case, *supra*, as well as dicta taken from *Thornhill v. Alabama*, *supra*, was elevated to the status of a flat holding in *Carpenters & Joiners Union of America v. Ritter's Cafe*, *supra*. In that case, the state's right to limit picketing to the "area of the industry" within which the labor dispute arises was upheld, and the Court ruled that picketing of an establishment which industrially had no connection with the dispute may be enjoined. Since the Court found no "violence, force or coercion" as far as the acts themselves were concerned, the *Ritter* case confirmed the line of authority already well established in state courts that peaceful picketing for unlawful object is not protected by the First and Fourteenth Amendments and the state could validly hold this picketing of a "neutral" illegal under its police power without conflicting with the constitutional doctrine.

In *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 S. Ct. 125, 88 L. Ed. 58, this Court reversed the New York Court and the picketing in these two consolidated cases was held to be protected by the Constitution's free speech guarantees. The opinion first quoted the *Senn* case dictum, 320 U.S. at 295, quoting 301 U.S. 468, 478,

> "members of a union might, 'without special authorization by a state, make known the facts of

> a labor dispute for freedom of speech is guaranteed by the Federal Constitution'."

Then followed this statement,

> "Later cases applied the Senn doctrine by enforcing the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as definited by state policy." 320 U.S. at 295

In support of this statement, the *Swing* and *Wohl* cases were cited. The *Ritter* case was not mentioned.

This statement appears on its face most damaging to respondent's contentions as offered herein. Contemplated in the abstract, it would seem insurmountable. But considered in the light of the factual situation presented to the Court by that case, it is by no means antithetical to affirmance in the instant case. In the *Angelos* case injunctions had been granted which barred a union from picketing two cafes which were being operated by their owners without employed help. The New York Court of Appeals in a 4-3 decision had affirmed the judgments granting these injunctions on the ground that there was no labor dispute present since there were no employees involved in either cafeteria and the picketers "unfair" signs were, therefore, deliberately false and misleading; the picketers had been insulting and conducted themselves unlawfully in that some of them had stated that "patronage of the cafes would aid the Fascist cause" and that the food served was "bad." Respondent here notes and emphasizes that the New York Court made no attempt to reach its conclusion on the basis of the PURPOSE of the picketing—which was to unionize these

cafeterias. Whether it could so have done or not is immaterial—the important fact being that unlawfulness of purpose was not before this Court.

Pursuing the factual situation somewhat further, as this Court obviously did, we find that the cafeterias at one time had been operated with employed non-union help. Thereafter, they had drawn up articles of partnership which brought the former employees into the status of partners. The union had contended in the trial court that these articles of partnership were a fraud and that most of the so called owners who were the previous non-union employees were actually in the same position as when they had served openly as employees. The union alleged that this fictitious partnership had been resorted to in order to take advantage of the state's rule that self employed business men who did not have any employed assistance could not be pressured by a union to employ help. The trial court had found against the union's contentions. See *Angelos v. Mesevich*, 289 N.Y. 498, 46 N.E.(2d) 903.

This Court found that the use of such words as "unfair" and "Fascist" were merely loose language and not 'falsification of facts' and that the acts themselves were not carried on in coercive manner. The incidence of abuse through insult were also found to be too "episodic and isolated" to justify suppressing the right of free speech.

In summary of the *Angelos* decision, it may be remarked that the actual economic situation at issue was almost identical (if one is willing to overlook the union's contentions as to the actual status of the "em-

ployers" in the *Angelos* case) with that of the *Senn* case, *i.e.*, an operating owner picketed by a union in an endeavor to induce him to cease self operation and to employ union assistants. But there is no similarity in either to the case at hand. Here respondent is a self employed operator as in the *Senn* case. The objective sought by the picketing there was to further unionize the craft in which the operator was engaging and to compel him to sign a union contract, a valid end under state policy of that state as respondent has heretofore indicated. The objective of the picketing in the *Angelos* case was likewise to compel unionization of the "quasi employers." At this point all resemblance between these cases and the one now before this Court ceases. The union in the instant case was not seeking to persuade the operator (respondent) to join the union. In fact, respondent was denied membership (R. 74).

The union here was attempting to force respondent to employ a union salesman and pay him a tribute of seven per cent on all sales made on respondent's lot, whether made by that salesman or not, and to conform to the hours of operation which the union had established through a contract with the dealers' association, of which respondent was not a member. The only alternative was to be picketed out of business.

In the *Giboni* case, *supra*, this Court took occasion to reaffirm its position that picketing, although peaceful, may be coercive and unlawful. There, in an effort to organize non-union ice peddlers an ice truck drivers' union obtained agreements from Kansas City ice wholesalers to refrain from selling ice to independent

peddlers. Upon the refusal of the Empire Storage and Ice Co. to enter into such an agreement, a picket line was thrown around the company's establishment. Truck drivers working for Empire's customers refused to cross the line, thereby, as the trial court found, cutting off 85% of the company's business. Empire obtained an injunction on its complaint that the efforts of union members to restrain it from selling to non-union drivers were in violation of the Missouri anti-trust statute, and that an agreement by Empire to refuse to make such sales would violate the same statute. The state supreme court affirmed and this Court unanimously affirmed.

Although the decision rests upon a state anti-trust statute, the principle announced is, as we have asserted earlier in this argument, clearly applicable to all labor objectives and the common law test of what constitutes an "unlawful" labor objective is used by this Court. This follows because of the power vested in the courts to exercise their equitable remedies to prevent conduct inimical to the public interest, and it is for the courts to determine through the exercise of these powers whether the conduct is unlawful on the basis of the facts before them. Acts and conduct by labor unions which would be held infractions in one situation might not be so considered in another for the purpose of injunction.

Under the Sherman Act, which the Court likened to the Missouri statute in the *Giboni* opinion, small doubt may be entertained that the Court is applying its test of reasonableness in considering the circumstances. Certainly the Sherman Act itself is broad

and unqualified. Nor does it contain any express exemption for any class of people. Nor does the definition of a "conspiracy" within the terms of the Sherman Act, Section 1 of Title 15, as a combination of two or more persons by concerted action to accomplish a criminal or "unlawful" purpose, or to accomplish some purpose not in itself criminal or "unlawful" by criminal or "unlawful' means, give any indication that any other than a 'common law" concept is to be applied in a given determination. This Court has, further, not hesitated to apply its conception of "unlawfulness" under the Sherman Act to union activity to find an absence of legitimate union objectives and this, in spite of the Clayton Act, United States Code Title 15, Section 12, *et seq.*; Code Title 18, Sec. 402, 660, 3285, 3691; Code Title 29, Sec. 52, 53; 38 Stat. 730. Under that act, labor unions were not to be enjoined under the anti-trust laws from "lawfully carrying out the legitimate objects thereof." Pickets were not to be enjoined "from attending at any such place where any such person or persons may lawfully be," and secondary boycott was legalized, but only when carried on "by peaceful and lawful means." These provisions enabled the courts to decide what was "lawful" or not under the traditional case-to-case approach. And the same result has been obtained under Section 105 of the Norris-LaGuardia Act, Code Title 18, Sec. 3692, Code Title 29, Sections 101-115, 47 Stat. 70 by a finding of "unlawful" conduct as permitted under other sections of that act. *Allen Bradley Company v. Int. Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939; *Colum-*

*bia River Packers' Assn. v. Hinton*, 315 U.S. 143, 62 S. Ct. 520, 86 L. Ed. 750.

Further pointing up our contention that the "common law" test is the test applied where the statutory wording is "unlawful" or "illegal" are the decisions of this Court in controversies arising under the federal Norris-LaGuardia Act which permits injunction to issue where "unlawful" acts are found. *Bakery Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437, 68 S. Ct. 630, 92 L. Ed. 792, is a good example. There this Court found no legitimate union objective, therefore no labor dispute, although the conduct complained of and interdicted was in violation of NO statute and the means employed were entirely peaceful.

The recent case of *Saveall v. Demers*, 322 Mass. 70, 75 N.E.(2d) 12, is illustrative of the reasoning used by the courts to determine, in the first instance, that union conduct is "unlawful" as not being directed to legitimate labor objectives and, therefore beyond the protection of the Constitutional right of "free speech" and therefore subject to restraint. Applying this test to the facts before it, the Court said:

> "This is not a controversy between employer and employees or between employer interest and employee interest. The plaintiff and a majority of the defendants are proprietors of one-man barber shops and employ no one. Those of the defendants who are employees of master barbers are one stage farther removed from any direct interest in the prices charged by the plaintiff than are the defendants who are proprietors of shops and such employees can have no greater

rights than the proprietors have. The controversy may therefore be treated as one between a group of proprietors and a single proprietor who refuses to accept dictation from the group in the conduct of his own business.

"The law has long been settled in this Commonwealth that intentional harm to the business of another like the harm caused by the defendants, acting in combination, to the business of the plaintiff is a tort unless justified as in the exercise of an equal and competing right, and that, in order to justify their conduct, the competing interest of the defendants must be direct and immediate and not indirect, remote or consequential."

The court then proceeded in its judging of the respective interests involved to say:

"If we are correct in supposing that the right to picket is subject, for the protection of paramount public welfare, to some balancing of the conflicting interests of the parties immediately involved, we have before us a case where, on the one hand, the contribution of the defendants' acts to the free interchange of thought in Fitchburg reaches the vanishing point, while on the other hand there is danger that the fundamental right of the plaintiff to work with his own hands to what he regards as his best advantage may be destroyed."

Respondent desires, in connection with the *Saveall* case to point out the substantial similarity of the *character* of the union in that case, in the *Hinton* case, *supra*, and in the instant case. In all, there was evidence in the record that the union was, to some extent made up of "proprietors" banded together for

purposes of furthering their interest, not only as employees, but additionally for the purpose of standardizing their trade practices to eliminate competition insofar as possible. There is the added factor in the instant case of the dual membership of many of these members in both the union and the dealers' association (R. 75).

Respondent in the foregoing discussion has stressed the fact that this Court has recognized and utilized the unlawful purpose doctrine.

It follows that application of this "unlawful purpose" test to the instant case in light of the "Little Norris-LaGuardia Act" involves a weighing of the conflicting interests of the parties and of the public interest. As more aptly stated by this Court in the *Ritter* case, *supra*, at 315 U.S., page 724:

> "The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contests."

Although in every instance of boycott and picketing it is obvious that one of the purposes is to injure the business of the person boycotted, yet where that is the sole purpose of the picketing, *i. e.*, where there is a lack of redeeming objectives to outweigh this purpose in balancing the interests involved, the union conduct is beyond the pale of the Constitution and although "unionization" of a trade or industry is concededly and now traditionally a valid union objective, it is still another view of picketing which would

allow non-employee picketing to compel unionization of some in the industry and complete cessation of work by others. That is to say, that assuming it was a valid union end to completely unionize the trade and thereby force all individual entrepeneurs to affiliate themselves with the union or abandon their business that is not this case. The union here is grossly and unjustly discriminating and retaliating against respondent for not accedifig to its demands upon him. Any action to compel a self operator to employ a man not of his own unqualified choice and further pay that man wages for work, regardless of whether it has any value or benefit to the self operator is discrimination and indeed paying homage to Caesar with a vengeance. Even though this condition were to be exacted of other self operators in the trade, which it was not, respondent seriously questions the legality and lawfulness of such a practice under the American system of free competition.

In this connection, respondent calls attention to the following language found in the *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 207.:

> "There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or cannot, participate in union assemblies."

If the union is permitted to succeed in its aims to induce respondent as an individual doing business as an intrepreneur to comply with hours not of his

own choosing, but established between parties not contractually related to him, and in its further aims to punish him for being obdurate on that score by exacting extracurricular tribute, the time will not be far off when the small business man in the community will find that the advantages of individual enterprise will be outweighed by the burden of union compliance. It seems difficult, to say the least, to believe that the picketing here involved has "slight, if any, repercussions upon the interests of strangers to the issue." Quite to the contrary, overruling of the injunction in this case will stand as an inhibition in a free society of the right to work as long and as hard as one pleases for one's self alone and will open the door to union tactics which if carried on by an individual would be plainly labelled "extortion."

Respectfully submitted,

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